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NO. 05-785

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS L. CAREY, WARDEN
Petitioner,

v.

MATHEW G. MUSLADIN,

Respondent.

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**BRIEF FOR RESPONDENT IN OPPOSITION**

The Respondent, Mathew G. Musladin, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 427 F.3d 653 (2005).

## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Under 28 U.S.C. § 2254(d)(1), may a federal court consider decisions of courts other than this Court in deciding whether a state-court decision is contrary to or an unreasonable application of this Court's precedents?

## COUNTERSTATEMENT OF THE CASE

### A. Statement of Facts

On May 19, 1994, Tom Studer was shot and killed. Nearly eighteen months later Mathew Musladin was tried for the murder of Studer. Musladin did not deny the shooting. His claim was self-defense. Thus, the only issue for the jury to resolve was whether he shot Studer out of an honest belief in the need for self-defense (as he testified) or out of a premeditated intent to kill (as the prosecutor theorized). If the jury found that Musladin honestly believed in the need for self-defense, the homicide could be no more than manslaughter.

Studer had been shot in the back of the right shoulder and in the head. The forensic evidence determined that both shots were fired at a distance; there were no powder burns. All experts, both prosecution and defense, agreed that the fatal injury, the wound to the head, was the result of a ricochet.

Immediately prior to opening statements, defense counsel motioned the court to preclude Studer's family from wearing buttons with Studer's photograph

on them as they had been doing each day up to that point. The trial court denied this motion. The Studer family sat in the front row, immediately behind the prosecutor, in plain view of and adjacent to the jurors. The buttons were several inches in diameter. At least three members of Studer's family were present every day of the trial wearing the buttons.

On November 1, 1995, Musladin was convicted of all counts – first-degree murder, attempted murder, first-degree burglary and assault with a firearm.

### B. Course of Proceedings in State Court

In 1998, the California Court of Appeal affirmed the judgment rejecting respondent's claim that the display of the buttons had deprived him of a fair trial. In 1999, Respondent filed a petition for writ of habeas corpus in the California Supreme Court. The petition was denied without comment in 2000.

### C. Course of Proceedings in District Court

On June 5, 2000, respondent filed a Petition for Writ of Habeas Corpus. The district court issued an Order to Show Cause on October 19, 2000, and the state filed an Answer on May 14, 2001. On August 16, 2001, respondent filed a Traverse.[1] On May 14, 2003, the district court denied the Petition for Writ of

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[1]The Office of the Federal Public Defender was appointed to represent respondent before the filing of the traverse.

Habeas Corpus in its entirety.

On June 12, 2003, respondent filed a Notice of Appeal and a Motion for Certificate of Appealability. On September 2, 2003, the district court granted respondent's Motion for a Certificate of Appealability as to all but one claim.

On April 8, 2005, the Ninth Circuit reversed. It held that respondent's right to a fair trial was prejudiced when the trial court allowed Studer's family to wear during the trial buttons emblazoned with a picture of Studer.[2] The panel majority accepted the state court's finding that the wearing of photographs of victims in a courtroom is an impermissible factor that should be discouraged. The majority found that the state court then improperly required respondent to prove that the buttons had branded him with an "unmistakable mark of guilt." *Id.* at 1076-79.

## REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant *certiorari* to address a decision of a court that breaks no new ground in the interpretation or application of 28 U.S.C. § 2254(d)(1) and does not conflict with any relevant decision of this Court. Contrary to Petitioner's arguments, certiorari review is unwarranted in this case.

Petitioner's contention that the panel improperly elevated circuit precedent

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[2]The panel was divided. Senior Circuit Judge David Thompson dissented, finding that the state court's decision was not contrary to or an unreasonable application of established Supreme Court law. *Musladin v. Lamarque*, 427 F.3d 653, 661 (9th Cir. 2005).

to "clearly established law" for purposes of applying § 2254(d)(1), misreads the decision. The relevant rule that was applied was taken directly from this Court's holdings in *Williams* and *Flynn*. Further, the assertion that there is a circuit split on the relevance of lower court opinions in the §2254(d)(1) analysis is a fiction. The panel's consideration of *Norris v. Risley*, 918 F.2d 828 (1990), in its analysis is completely consistent with how other circuit courts apply §2254(d)(1).[3]

Petitioner also accuses the panel majority of engaging in a selective parsing of the state court opinion in order to discern an incorrect legal standard. In fact, the state court opinion is completely clear on the legal standard it was applying when ruling on the claim of error, and the panel correctly found that standard to be contrary to this Court's precedent.

Lastly, Petitioner for the first time in this case raises an argument about prejudice that is taken largely from the dissent to the denial of rehearing authored by Judge Bea. The failure to make this argument below waives it. Further, Judge Bea, as well as Petitioner, misreads *Williams* and *Flynn* on the issue of prejudice. Because the Ninth Circuit's application of §2254(d)(1) was correct and consistent

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[3]Indeed, in Petitioner's rehearing petition below, Petitioner conceded the relevance of *Norris* in the application of § 2254(d)(1). Appellee's Petition for Rehearing at 11 ("we acknowledge that the decisions of circuit and state courts may help to determine what law has been 'clearly established' by the Supreme Court and the reasonableness of a particular application of that law."), ("Circuit and state authority are relevant only to the extent they help evaluate what is clearly established and reasonable under Supreme Court law.")

with this Court's decisions, and its decision neither creates nor reflects a circuit split, there is no reason for the Court to grant certiorari in this case.

### 1. There is No Genuine Conflict Between Decisions as the Decisions of this Court and of the Circuits are in Almost Complete Agreement

Petitioner argues that the Court should grant review to resolve an "inconsistency" in circuit authority about the proper use of lower federal court authority under 28 U.S.C. § 2254(d)(1).[4] *Petition* at 12-13. Specifically, petitioner claims that "[c]ircuit decisions are not entirely consistent" on the issue of whether a federal appellate court, on habeas review, may consider federal appellate court decisions at all in determining whether a state-court decision is contrary to or an unreasonable application of clearly established Supreme Court law. *Petition* at 12. Petitioner overstates any discrepancy that may exist among the circuits, and the authorities it cites largely do not support its argument.

Petitioner fails to appreciate the distinction between what is "clearly established Federal law" as established by this Court's decisions under §2254

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[4]Petitioner and the judges disagreeing with the decision below have not agreed about the existence or extent of any circuit split. The dissent fails to note any circuit split. *Musladin*, 427 F.3d at 661-63 (Thompson, J., dissenting). Petitioner characterizes it as an "inconsistency." *Petition* at 13. One dissent from the denial of rehearing en banc takes the most extreme view: the majority's decision "sharpened a serious circuit split." *Musladin v. Lamarque*, 427 F.3d 647, 650-51 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

(d)(1) and what authorities a lower court may consider in deciding whether a state-court decision is contrary to or an unreasonable application of that law. This distinction is honored, correctly, in the decision below and by every circuit. No circuit, including the Ninth Circuit, allows the writ to be granted based on "clearly established Federal law" as established by circuit court decisions. *See, e.g.*, *Musladin*, 427 F.3d at 655 ("AEDPA limits the source of clearly-established federal law to Supreme Court cases."); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000) (rejecting petitioner's argument that district court erred by "ignoring this court's previous jurisprudence and by relying solely on Supreme Court precedent" in adjudicating his petition under § 2254(d)(1)); after AEDPA, Ninth Circuit "can no longer reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal Constitutional issue."). Nor does any circuit prohibit the use of lower-court decisions in applying § 2254(d)(1). On the contrary, every circuit, either in practice or by explicit holding, allows federal appellate decisions to be considered.

Petitioner describes the alleged inconsistency amongst the circuit courts as follows. *Petition* at 12-13. On one side are *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002), *Matteo v. Superintendent*, 171 F.3d 877 (3d Cir. 1999), *Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003), and the decision below, all of which are

circuit court decisions that use federal appellate decisions in determining "whether a given application of Supreme Court authority is reasonable." *Petition* at 12. In *Ouber*, the First Circuit acknowledged AEDPA's requirement that "the relevant legal rule be clearly established in a Supreme Court holding, rather than in dictum or in holdings of lower federal courts." 293 F.3d at 26.

> This does not mean, however, that other federal court decisions are wholly irrelevant to the reasonableness determination. "To the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness vel non of the state court's treatment of the contested issue." *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998). Reference to such cases may be especially helpful when the governing Supreme Court precedent articulates a broad principles that applies to a wide variety of factual patterns.

*Id.*

The *Ouber* Court, faced with a habeas claim of ineffective assistance of counsel, held that in applying the principles of *Strickland* to a particular case,

> it is helpful to examine precedents from lower federal courts to determine how the general standard applies to a particular set of facts. Although such decisions are not themselves binding on a state court under the AEDPA framework, . . . resort to them is appropriate for the purpose of discerning the requirements of *Strickland* in factually similar cases.

*Id.* at 26-27 (citations omitted)

In *Matteo*, the Third Circuit, sitting en banc, considered the role of federal appellate court decisions in applying § 2254(d)(1)'s standard of review:

> [W]e do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable. . . . Instead, the primary significance of the phrase "as determined by the Supreme Court of the United States" is that federal courts may not grant habeas corpus relief based on the state court's failure to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not addressed. Thus, in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent.

*Id.* at 890. The Third Circuit, like the First Circuit in *Ouber*, held that a circuit court may consider its own and other appellate court decisions in deciding whether a state court reasonably applied Supreme Court precedent, particularly when deciding whether a given state-court decision was a reasonable application of a broadly stated Supreme Court rule.

Similarly, the Eighth Circuit in *Williams* concluded that while federal appellate decisions "do not, of course, make a legal principle 'clearly established for the purposes of § 2254(d)(1) because they do not issue from the Supreme Court, nonetheless, they provide significant insight into what constitutes reasonableness for a particular fact pattern.'" *Williams v. Bowersox*, 340 F.3d

667, 671 (8th Cir. 2003) (quoting *Phoenix v. Matesanz*, 233 F.3d 77, 83 n.3 (1st Cir. 2000)).

To establish the other side of the "circuit split," petitioner cites three cases -- from the Sixth, Fourth and Seventh circuits -- as reaching a contrary conclusion about the appropriate use of federal appellate court cases in the § 2254(d)(1) analysis.[5] Petitioner draws the wrong conclusion from these cases. A close reading of the cases, and a review of other cases from these circuits, reveals that their holdings are consistent with the holdings of the First, Third, Eighth and Ninth circuits.

In *Bell v. Jarvis*, 236 F.3d 149, 158 (4th Cir. 2000) (en banc), the Fourth Circuit discussed its reliance on appellate court decisions to assess the objective reasonableness of the state-court decision before it. "[W]e are satisfied that *Williams* [*v. Taylor*, 529 U.S. 362 (2000)] does not act as an absolute prohibition against our use . . . of circuit precedent." *Id.* at 174 n.17.

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[5]One dissent also cited a Tenth Circuit case, *Welch v. City of Pratt*, 214 F.3d 1219 (10th Cir. 2000). *Musladin*, 427 F.3d at 650 & n.18 (Kleinfeld, J., dissenting from denial of petition for rehearing en banc). The passage the dissent cites from *Welch* is non-controversial; it merely reaffirms the fundamental principle that, under § 2254(d)(1), federal appellate decisions are not "clearly established law." It says nothing about the issue here: whether a circuit court may consider lower federal court decisions in assessing the reasonableness of a state court decision. In fact, the Tenth Circuit in *Welch* cited several federal appellate cases in deciding whether the challenged jury instructions satisfied the Supreme Court's constitutional requirements. 214 F.3d at 1221-22. *Welch* does not support petitioner's argument that there is a circuit split.

> [T]he *Williams* decision did not suggest or command that this court make the reasonableness determination in a vacuum. . . . Where the otherwise objectively reasonable bases for a state court's interpretation of a given precedent are common to the reasoned decision of many courts, it would be judicial myopia of the first order to ignore the force of consensus in assessing the objective reasonableness in the particular case.

*Id.* (internal brackets, quotation marks, citation and ellipses omitted)

The Seventh Circuit case petitioner cites, *Bocian v. Godinez*, 101 F.3d 465 (7th Cir. 1996), pre-dates this Court's interpretation of § 2254(d)(1) in *Williams*. As such, it is of dubious value. In subsequent cases, the Seventh Circuit has considered federal appellate decisions in deciding whether a state-court decision was contrary to or an unreasonable application of Supreme Court precedent. *See, e.g.*, *Easley v. Frey*, 433 F.3d 969, 972-74 (7th Cir. 2006) (discussing circuit-court decisions interpreting Supreme Court decisions and citing approvingly decisions of three circuits in deciding whether state court reasonably applied this Court's law regarding interrogations); *Burt v. Uchtman*, 422 F.3d 557, 564-70 (7th Cir. 2005) (considering Seventh Circuit cases in deciding whether trial court should have ordered competency hearing before accepting plea and whether attorney was ineffective for failing to request competency examination); *Jackson v. Frank*, 348 F.3d 658, 665 (7th Cir. 2003) (considering other circuits' decisions about whether

misstatement of law renders *Miranda* waiver involuntary: "Although the only definitive source of clearly established federal law under the AEDPA is Supreme Court authority . . . the determination by one of our sister circuits that a misstatement of state law alone does not vitiate a *Miranda* waiver certainly makes it more difficult to conclude that the [state court] unreasonably applied Supreme Court authority."); *Searcy v. Jaimet*, 332 F.3d 1081, 1901-91 (7th Cir. 2003) (considering federal appellate cases in deciding whether trial court restrictions on cross-examination were permissible).

Although the Sixth Circuit has stated that it may not consider its own decisions in determining whether a state-court decision is contrary to or an unreasonable application of clearly established federal law,[6] it has not excluded appellate decisions from the § 2254(d)(1) review process. The Sixth Circuit has held that circuit-court decisions may -- or must -- be considered in determining what is clearly established law under § 2254(d)(1).

> First, "the decisions of the United States Court of Appeals may be informative to the extent we have already reviewed and interpreted the relevant Supreme Court case law to determine whether a legal principle or right had been clearly established by the Supreme Court." We are also bound by any prior Sixth Circuit

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[6]*See, e.g., Arnett v. Jackson*, 393 F.3d 681, 688 (6th Cir. 2005); *Mizel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001).

> decisions concluding that federal law on a particular issue has been "clearly established" by certain holdings of the Supreme Court.

*Smith v. Stegall*, 385 F.3d 993, 998 (6th Cir. 2004) (citations omitted). In practice, the Sixth Circuit in *Smith* considered federal appellate decisions in addressing an issue not considered by this Court in *Santobello v. New York*, 404 U.S. 257 (1975): what constitutes a breach of a plea agreement. *Id.* at 999-1001. The court also concluded that the state court's decision was not unreasonable at least in part because the Sixth Circuit followed the same approach in interpreting plea agreements. *Id.* at 1001.

Decisions from the other three circuits are consistent with this approach: They do not rely on circuit-court decisions to state what is clearly established law but they consider these decisions in assessing the state courts' application of clearly established law. *See, e.g.*, *Coleman v. Dretke*, 395 F.3d 216, 222, 224 & nn. 26 and 34 (5th Cir. 2004) (considering other circuits' application of Supreme Court case to facts similar to those in habeas case and in discussing whether clearly established law requires conclusion that sex-offender treatment shocks the conscience); *Cotto v. Herbert*, 331 F.3d 217, 250 (2d Cir. 2003) ("Although our task is to determine whether the state courts reasonably applied clearly established Supreme Court law, we think it appropriate to make some examination of how the

federal courts of appeals have analyzed the issue." (quotation marks omitted)); *Hawkins v. Alabama*, 318 F.3d 1302, 1309 (11th Cir. 2003) (although federal appellate decisions are not clearly established federal law, they "are helpful to the AEDPA inquiry only to the extent that the decisions demonstrate that the Supreme Court's pre-existing law compelled lower courts to decide in a definite way the case before them.").

Indeed, this Court has cited the decisions of federal appellate courts in applying § 2254(d)(1). In *Price v. Vincent*, 538 U.S. 634, 643 n.2 (2003), the Court noted decisions from "numerous other courts [that] refused to find double jeopardy violations under similar circumstances" to support its conclusion that the state-court decision was reasonable. And in *Kane v. Espitia*, 126 S. Ct. 407 (2005), the Court cited the circuit split about whether *Faretta* implies a right to law-library access to support its conclusion that the right was not clearly established by *Faretta*.

The Ninth Circuit's use of its own precedent, in this case and in others, is consistent with the use of circuit precedent in this Court and all the other circuits.

> AEDPA limits the source of clearly-established federal law to Supreme Court cases. Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine "whether a particular state court decision is an

'unreasonable application' of Supreme Court law,
and. . .what law is 'clearly established.' "

*Musladin*, 427 F.3d at 655 (quoting *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (ellipses in original)). Its use of *Norris* in this case did not create, further or even contribute to a circuit split. All the circuits agree that lower court decisional authority has a limited but appropriate role in determining whether a state court has reasonably applied clearly established Supreme Court precedent. Because there is little dissension and no genuine conflict among the circuits, granting a writ of certiorari in this case is not necessary to secure uniformity of decision.[7]

### 2. The Decision Below Did Not Break New Ground in the Interpretation or Application of § 2254(d)(1), and it Did Not Conflict With Any Decision of this Court

The Ninth Circuit in this case properly applied the standard of review set forth in 28 U.S.C. § 2254(d)(1). After determining the applicable rule from this

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[7] *See Powell v. Nevada*, 511 U.S. 79, 86-87 (1994) (discussing importance of denying certiorari except in cases "where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal") (Thomas, J. (with Rehnquist, C.J.,) dissenting); *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (noting that Court frequently denies cert. review even where there is undeniable circuit split "because the conflict is 'tolerable' or 'narrow,' or because other courts of appeal should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason."); *Layne & Bowler Corp. v. Western Well Work, Inc.*, 261 U.S. 387, 392093 (1923) (dismissing cert. as improvidently granted; Court granted cert. because of claimed circuit split, but upon review circuits "were really in harmony and not in conflict and . . . there was no ground for our allowing the writ of certiorari to add to an already burdened docket.").

Court's cases, it concluded that the state appellate court decision was both contrary to and an unreasonable application of that rule. The Ninth Circuit's application of § 2254(d)(1) followed this Court's interpretation of the statute in *Williams v. Taylor*. Neither the process it followed nor its result conflicts with any decision of this Court. There is no good reason for the Court to grant certiorari to review this case.

### a. What the Ninth Circuit Did in This Case

To apply § 2254(d)(1), a federal court on habeas review must first identify the clearly established Supreme Court law. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Bell v. Cone*, 535 U.S. 685, 695-97 (2002); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Then it must determine whether the state-court decision was "contrary to" or an "unreasonable application of" that law. 28 U.S.C. § 2254(d)(1). That is what the court below did in this case.

The Ninth Circuit identified the "clearly established Federal law" by relying on two cases from this Court, *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). *Musladin* 427 F.3d 653, at 656-57. From these cases, the court derived the rule to be applied to respondent's claim: "[C]ertain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently

prejudicial' to a criminal defendant." *Id.* at 656 (citing *Williams* and *Flynn*). It then discussed the facts of these two cases and their application of the rule. *Id.* at 656-57. The Ninth Circuit also discussed its own prior case, *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), as a tool for "assess[ing] . . . the meaning of the federal law that was clearly established by *Williams* and *Flynn* and whether the state court's application of that law in the case before [it was] objectively unreasonable." *Id.* at 657.

The court below compared the rule of *Williams* and *Flynn* to the rule applied by the state court in respondent's case. *Id.* at 658. The state court's decision was contrary to the rule of *Williams* and *Flynn*, the Ninth Circuit held, because it

> required that the challenged practice not only constitute an unacceptable risk of an impermissible factor coming into play but also that it "brand" the defendant with an "unmistakable mark of guilt." This additional test imposes too high and too unreasonable a burden on defendants and is contrary to established Supreme Court law.

*Id.* at 659; *see Williams*, 529 U.S. at 393-99 (finding state-court decision contrary to Supreme Court precedent because it required petitioner to make additional showing beyond what Supreme Court rule required). The Ninth Circuit then discussed this Court's use of the phrase "branding with an unmistakable mark of

guilt" in *Williams* and *Flynn* to show that it was not part of the Court's rule and should not have been a part of the test applied by the state court to respondent's claim. *Id.* at 659-60 & n. 2.

Finally, using *Norris* for comparison, the Ninth Circuit concluded that the state court unreasonably assessed the prejudice respondent suffered from the buttons in light of the particular facts of his case. *Id.* at 660. It concluded that the message conveyed by the spectator buttons in this case was stronger, more prejudicial, more direct and clear that the anti-rape message on the buttons in *Norris*. *Id.* In light of "the specific message that the button conveys in light of the particular facts and issues before the jury," the Ninth Circuit concluded that "a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty." *Id.* at 661.

The Ninth Circuit thus held that the California court of appeal decision was both contrary to and an unreasonable application of this Court's precedents. *Id.* It held that the state court unreasonably applied a rule contrary to the rule set forth in *Flynn* when, despite its finding that the buttons were an "impermissible factor," it denied relief because the buttons did not brand respondent with "an unmistakable mark of guilt." *Id.*

### b. The Ninth Circuit Decision Was Consistent With § 2254(d)(1) and This Court's Precedents

Petitioner apparently does not dispute the substance of the rule the Ninth Circuit applied in this case, nor does it dispute that the rule is clearly established Supreme Court authority. *See Petition* at 8-9 ("The relevant inquiry is whether the challenged courtroom practice 'was so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial.'" (quoting *Flynn*, 475 U.S. at 570)); *see also id.* at 14 ("the state court set forth the correct standard for evaluating Musladin's claim, and identified the most closely applicable cases of this Court . . . .").[8] There is no dispute that the rule from *Williams*, decided in 1976, and *Flynn*, decided in 1986, was clearly established Supreme Court precedent at the time of respondent's 1995 trial and subsequent appeal.

Petitioner claims, however, that the court below relied on its own precedent "*qua* established Supreme Court law", and standing alone, to "dictate that a given state court decision was an unreasonable application of Supreme Court authority under 2254(d)(1)." *Petition* at 13. It also claims that the court violated *Woodford v. Visciotti* by "selectively pars[ing] the state-court opinion to tease out what it

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[8]This is substantially the same rule that the state appellate court applied. *See Petition* Appendix 74a ("The test for inherent prejudice is . . . whether an unacceptable risk is presented of impermissible factors coming into play.").

mistakenly characterized as an incorrect standard employed by the state court." *Id.* at 8. Finally, Petitioner argues that the Ninth Circuit violated *Deck v. Missouri* by "concluding that a finding of inherent prejudice requires reversal without further inquiry." *Id.*

As discussed below, the Ninth Circuit's decision correctly applied § 2254(d)(1). It was consistent with this Court's decisions interpreting the statute and with *Deck*. Petitioner's opinion that the court reached the wrong result, even if correct, would not warrant the granting of certiorari in this case. *See* Supreme Court Rule 10 (certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly state rule of law.").

**i. The Ninth Circuit Properly Considered *Norris* in Applying § 2254(d)(1)**

The Ninth Circuit did not grant relief in this case based on its own precedent. In fact, its primary holding -- that the state-court decision was contrary to Supreme Court precedent because it required a showing that *Williams* and *Flynn* did not -- was based solely on *Williams* and *Flynn*; the only reference to *Norris* was in a footnote. *Musladin*, 427 F.3d at 658-60 & n.1.

As an alternative basis for granting the writ, the Ninth Circuit held that the state court's application of the clearly established Supreme Court rule was

objectively unreasonable. In reaching this conclusion, the Ninth Circuit did consider *Norris*, its own prior case, that applied the same rule and was factually very similar to respondent's claim. The Ninth Circuit's reference to *Norris* in the circumstances of this case was not contrary to § 2254(d)(1) or this Court's cases.

The "persuasive weight" the Ninth Circuit said it was giving *Norris* is far from the controlling weight that Petitioner and the dissenting judges ascribe to it. An authority given "persuasive weight" is not controlling; rather, it

> constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 499-500 (1958) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) (describing persuasive weight given to interpretation of statute by agency charged with administering statute).[9]

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[9]*See also Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 52 (1939) ("Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with the applicable decisions of the court as to produce inconsistency and confusion in the administration of the law. . . . But courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings."); *Wallace v. Christensen*, 802 F.2d 1539, 1559 (Kozinski, J., concurring) (discussing decision by then-judge Scalia contrasting the "'authoritative, as opposed to the persuasive weight'" of legislative history); *California Hosp. Ass'n v. Henning*, 770 F.2d

Nothing in § 2254(d)(1) or in this Court's decisions interpreting it prevents a federal appellate court from considering, as non-binding authority, lower court decisions for the purpose of deciding whether a state-court decision was contrary to or an unreasonable application of Supreme Court precedent. Indeed, this Court, in assessing whether a state court's conclusion about whether jeopardy was terminated was an objectively reasonable application of clearly established Supreme Court law, cited decisions from "numerous other courts [that] refused to find double jeopardy violations under similar circumstances." *Price v. Vincent*, 538 U.S. 634, 643 n.2 (2003); *see also Kane v. Espitia*, 126 S. Ct. 407 (2005) (citing circuit split about whether *Faretta* implies right to law-library access to support conclusion that *Faretta* did not clearly establish right).

This Court reversed the Ninth Circuit in *Kane v. Espitia*, 126 S. Ct. 407 (2005), because the court in that case granted habeas relief based solely on its own precedent. In that case, the Ninth Circuit admitted that its decision was based not on a rule of law clearly established by this Court's decisions but solely on its own precedent. The court in that case acknowledged that decisions from other circuits were to the contrary but concluded that it was bound by its own prior decisions.

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856, 859 (9th Cir. 1985) (although regulation embodying agency's interpretation of statute carries persuasive weight, courts must decide whether regulation is a "reasonable and permissive construction of the statute").

*Espitia v. Ortiz*, 113 Fed. Appx. 802, 804-05 (9th Cir. 2004), *reversed by Kane v. Espitia*, 126 S. Ct. 407 (2005). Noting that *Faretta* was the only Supreme Court case identified as a source for the claimed right and noting the circuit split about whether *Faretta* in fact implies such a right, this Court concluded that the circuit court had "erred in holding, based on *Faretta*, that a violation of a law library access right is a basis for federal habeas relief." *Id.*

In this case, by contrast, and as petitioner acknowledges, the Ninth Circuit relied on the rule clearly established by this Court in *Williams* and *Flynn*. *See Petition* at 5-6 ("the Ninth Circuit held the state court's rejection of constitutional error in allowing the spectator's buttons was an unreasonable application of *Estelle v. Williams*, 425 U.S. 501, and *Holbrook v. Flynn*, 475 U.S. 560. . . . The Ninth Circuit additionally found that the state court unreasonably applied *Estelle* and *Flynn*"). As discussed above, although the Ninth Circuit considered its prior decision in *Norris*, it did not rely on it as "clearly established law" under § 2254(d)(1) or find the state-court decision objectively unreasonable based solely on it. In short, while the panel in *Espitia* considered itself bound by its prior precedent and applied that authority, instead of this Court's case law, in granting relief, the Ninth Circuit below correctly applied § 2254(d)(1), identified and relied on the applicable Supreme Court precedents and weighed its own precedent only

in deciding whether the state-court application was reasonable.

Petitioner and the judges dissenting from the denial of rehearing en banc would prohibit the lower federal courts from citing any non-Supreme Court decision for purposes of the § 2254(d)(1) analysis. *See Musladin*, 427 F.3d at 648 ("The only question for us is whether there is any Supreme Court authority that holds that silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence. The answer is that there is no such case. That should be the end of our inquiry.") (Kleinfeld, J., dissenting from denial of rehearing en banc); *Petition* at i (Question Presented calls for certiorari review because Ninth Circuit exceeded its authority under §2254(d(1) by granting habeas relief "[i]n the absence of controlling Supreme Court law.")

In this case, in particular, the Ninth Circuit could not have decided the reasonableness of the state-court decision without discussing *Norris* because the state court itself relied heavily on *Norris* in addressing respondent's claim. *See Petition* Appendix at 74a-75a. On habeas review, a federal court must ensure that "neither the reasoning nor the result of the state-court decision" is contrary to this Court's cases. *Early v. Packer*, 537 U.S. 3, 8 (2002). If the Ninth Circuit were barred from considering *Norris* in this case, it would have had to either ignore the

state court's reasoning or fashion an alternative basis for the state court's decision. The Ninth Circuit could not have assessed the state court's reasoning without discussing the legal basis for its reasoning.

In sum, the Ninth Circuit's use of *Norris* in deciding whether the state court reasonably applied *Williams* and *Flynn* to the facts of respondent's claim was entirely consistent with § 2254(d)(1) and this Court's decisions. Petitioner's arguments rest on mischaracterizations of the decision below and an overly cramped reading of § 2254(d)(1) that this Court has rejected. There is no reason for the Court to grant certiorari in this case.

### ii. The Decision Does Not Announce Any Rule Applicable to this Case

Petitioner argues that the court below violated *Woodford v. Visciotti* by "selectively pars[ing] the state-court opinion to tease out what it mistakenly characterized as an incorrect standard employed by the state court." *Petition* at 8. *Visciotti* was a very fact-specific case. The errors this Court identified in the lower court's application of § 2254(d)(1) were grounded in the facts of the state-court decision. *Woodford v. Visciotti*, 537 U.S. 19, 22-26 (2002). It did not set forth any rule applicable to this case that the Ninth Circuit violated.

In *Visciotti*, a capital case, the Court chastised the Ninth Circuit for

concluding that the California Supreme Court applied the wrong standard to petitioner's *Strickland* claim because it occasionally dropped the modifier "reasonably." *Id.* at 23-24. It noted that the state court had repeatedly stated the standard correctly and that it had, itself, occasionally stated the standard as the state court had. *Id.* This Court held that the Ninth Circuit had overlooked the state court's correct statement and application of the law and reversed its grant of the writ. *Id.* at 25.

In this case, by contrast, there is no dispute that the state court correctly recited the applicable Supreme Court standard: "The test for inherent prejudice is ... whether an unacceptable risk is presented of impermissible factors coming into play." *Petition* Appendix 74a. Where it went wrong, however, was in failing to follow the rule it stated.

As the Ninth Circuit correctly held, when the state court required branding after it already had found inherent prejudice, it applied a rule that was contrary to this Court's rule in *Williams* and *Flynn*. *Musladin*, 427 F.3d at 658-59. The Ninth Circuit's recognition of this error was in no way contrary to *Visciotti*. Petitioner's disagreement with the Ninth Circuit's conclusion is not a basis for this Court to grant certiorari.

### 3. Petitioner's Harmless-Error Argument is Waived and Incorrect

Petitioner argues that this Court should grant certiorari because the Ninth Circuit erred when, after it found constitutional error under *Flynn* and *Williams*, it treated the error as structural instead of considering whether it had a substantial and injurious effect or influence on the jury under *Brecht v. Abrahamson*, 328 U.S. 619 (1993). *Petition* at 15-16. Petitioner waived this argument by not raising it in the court below. Moreover, petitioner is wrong; there is no indication that the Ninth Circuit treated this error as structural.

This Court should not grant certiorari to address Petitioner's claim that the Ninth Circuit's decision conflicts with *Deck* because Petitioner waived this argument. *See Petition* at 15-16. Petitioner did not raise any argument about harmless error in the courts below. Petitioner did not argue in the district court or the Ninth Circuit that even if respondent established a constitutional violation from the spectator buttons, he would be entitled to relief only if the violation had a substantial and injurious effect or influence on the verdict. Even after the Ninth Circuit granted relief, petitioner did not, in its rehearing petition, argue, as it does here, that the court erroneously treated the constitutional violation as structural error. Petitioner has waived this argument.

"Like other defenses to habeas corpus relief, the 'harmless error' obstacle does not arise until the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense." Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.2(a) (4th ed. 2001); *see, e.g.*, *Saldano v. Roach*, 363 F.3d 545, 554 (5th Cir. 2004) (noting that district court's finding that state waived harmless error argument was not inconsistent with Supreme Court precedent); *Cook v. McKune*, 323 F.3d 825, 840 n.9 (10th Cir. 2003) (granting writ because state did not argue error was harmless and declining to address harmlessness absent briefing by parties or consideration by district court); *Lam v. Kelchner*, 304 F.3d 256, 269 (3d Cir. 2002) (finding that state waived harmless-error argument by failing to raise it in district court); *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (concluding that state waived harmless-error argument by failing to raise it in opening brief); *see also Trest v. Cain*, 522 U.S. 87, 89 (1997) (holding that state may waive procedural-default defense by not raising it); *cf.* 28 U.S.C. § 2254(b)(3) (under AEDPA, state does not waive exhaustion requirement unless it does so explicitly).

This Court generally will not address issues that were not raised, briefed or resolved in the lower federal courts. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001); *United States v.*

*Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Schiro v. Farley*, 510 U.S. 222, 228 (1994). This is particularly true when the claim is complex and has broad implications. *Baldwin v. Reese*, 541 U.S. 27, 34 (2004). This Court is "reluctan[t] to adopt rules that allow a party to withhold raising a defense until after the 'main event' – in this case, the proceeding in the District Court – is over." *Granberry v. Greer*, 481 U.S. 129, 132 (1987) (holding that court may address merits of claim if state does not argue non-exhaustion); *see also Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988) (finding state's argument about prejudice waived because state failed to dispute prejudice in lower federal courts; "Having conceded this point in both courts below, respondent will not be heard to dispute it here.").

Because petitioner did not raise this argument below, the parties did not brief it and the courts below did not address it. Respondent established a constitutional violation by showing that the spectator buttons, in the context of his trial, were inherently prejudicial; as Petitioner acknowledges, he did not rely on a theory of actual prejudice, and he did not need to show actual prejudice. *Petition* at 15; *see Deck*, 125 S. Ct. at 2015 ("where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation."); *see also Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (holding that defendant who

challenges courtroom procedure can establish constitutional violation either by showing that it was inherently prejudicial or that it was actually prejudicial); *see also* Brief of Appellee at 28 n.24 (emphasis in original) *see also* "Appellee's Petition for Rehearing" at 4 n.2 ("There is no claim of actual prejudice by defendant."). To determine whether a constitutional violation is harmless under *Brecht*, a court must decide whether the error "resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). No court below has done that in this case. This Court should not grant certiorari to address this argument that Petitioner failed to raise in the courts below.

That being said, the Ninth Circuit's decision in this case encompasses the *Brecht* harmless-error standard. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (holding that federal habeas court need not conduct harmless error once it has found *Bagley* error because finding of prejudice required for such error subsumes *Brecht* requirement of substantial and injurious effect or influence on jury's verdict). The Ninth Circuit held that because the buttons worn by the spectators at respondent's trial created an unacceptable risk of impermissible factors coming into play, they were inherently prejudicial to his constitutional right to a fair trial. *Musladin*, 427 F.3d at 658; *see also Musladin*, 427 F.3d at 661 ("[A] reasonable jurist would be compelled to conclude that the buttons worn by Studer's family

members conveyed the message that the defendant was guilty.")

How could a courtroom arrangement that was "inherently prejudicial" to the defendant's right to a fair trial and "conveyed the message that the defendant was guilty" *not* have a substantial and injurious effect or influence on the jury's verdict? At the very least, the Ninth Circuit had serious doubts about whether the constitutional error affected the jury's verdict in respondent's case, and it therefore properly granted the writ. *See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (holding that error may not be treated as harmless under *Brecht* if court has serious doubts about its harmlessness).

## CONCLUSION

For the reasons set forth herein Respondent Mathew G. Musladin respectfully requests that the Petition for Writ of Certiorari filed by Petitioner Thomas L. Carey be denied.

Respectfully submitted,

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NO. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS L. CAREY, WARDEN
Petitioner,
v.
MATHEW G. MUSLADIN,
Respondent.

CERTIFICATE OF SERVICE BY MAIL

I, David Fermino, counsel appointed pursuant to the Criminal Justice Act of 1964, 18 U.S. C. § 3006A(a)(2)(B), (d)(7), hereby certify that on this 7th day of March, 2006, 11copies of the Brief of Opposition to the Petition for Writ of Certiorari in the above-entitled case were sent, by Fed-Ex, a third-party commercial carrier to the Clerk of the Supreme Court of the United States and within the time allowed for filing said Brief in Opposition was served on the following counsel:

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